SUPREME COURT, U. S.

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No. 285

In the Supreme Court of the United States

OCTOBER TERM, 1967

RUTH DELL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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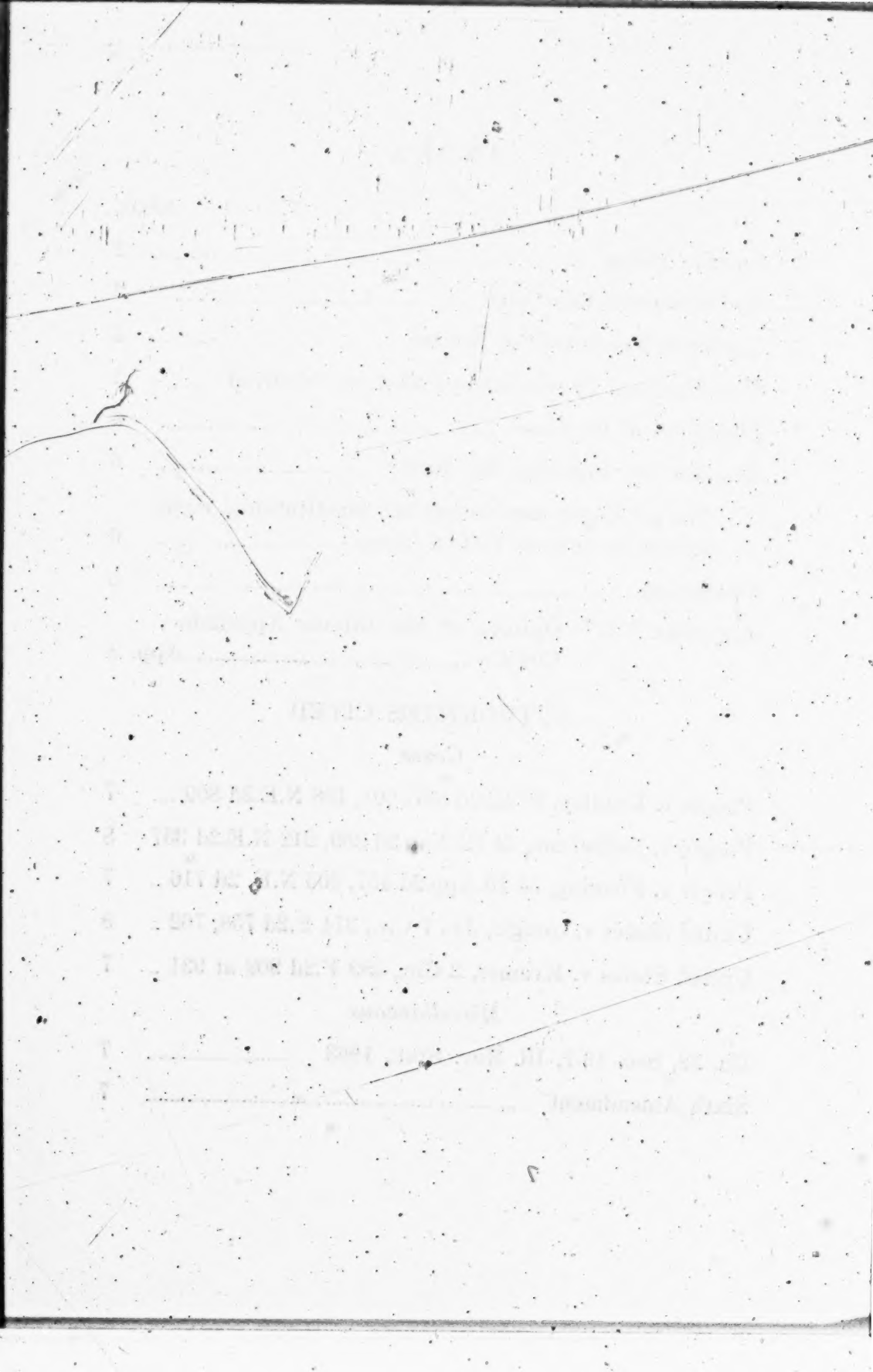

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

To The Honorable The Chief Justice and Associate Justices of The Supreme Court of The United States:

The petitioner, Ruth Dell, prays that a Writ of Certiorari be issued to review the decision of the Appellate Court of Illinois, Second District, affirming the judgment of the Circuit Court of Lake County, Illinois, in which petitioner was found guilty of theft after a jury trial and for which petitioner was sentenced to a term of five to ten years in the Illinois State Reformatory for Women (A. 8).[1]

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[1] "A" refers to the Abstract of Record as filed in the Appellate Court of Illinois, No. 65-135. The Abstract is found in the record as certified by the Clerk of the Supreme Court in Case No. 40454.

OPINION BELOW

The opinion of the Illinois Appellate Court, Second District is reported in 77 Ill. App. 2d 318, 222 N.E. 2d 357, and is reprinted herein as Appendix A.

The Supreme Court of Illinois denied, without opinion, a Petition for Leave to Appeal from the Appellate Court of Illinois Second District, on March 28, 1967.

JURISDICTION OF THIS COURT

The date of judgment sought to be reviewed was entered on March 28, 1967 when the Petition for Leave to Appeal in the Supreme Court of Illinois was denied. This petition for a Writ of Certiorari is filed within 90 days from said denial.

The jurisdiction of this court is invoked under Title 28, U.S. Code, Section 1257(3) and 22(1) of the rules of this court.

QUESTIONS PRESENTED FOR REVIEW

1. May the defendant be denied her right to a trial by jury on all the facts in issue, especially where the factual finding directed by the trial judge adverse to the petitioner made a difference between imprisonment of no more than one year in the county jail or imprisonment, as here imposed, of five to ten years in the penitentiary?

2. Where one of the issues in disputation is the value of the merchandise alleged to have been stolen, may the trial judge insert in the verdict form the value of the merchandise, thus taking away from the jury's consideration that factual and disputed determination?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

Article 2, Section 5, Constitution of the State of Illinois

The right of trial by jury as heretofore enjoyed, shall remain inviolate . . . .

Chap. 38, Sec. 16-1, Illinois Revised Statutes, 1963

Penalty:

A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both . . . A person convicted of theft of property from the person or exceeding $150 in value shall be imprisoned in the penitentiary from one to ten years.

STATEMENT OF THE CASE

Petitioner was accused of the theft of 129 pairs of pants having a value over $150.

The State offered testimony from one, Stan Freberg, a 21 year old young man, who testified that on July 21, 1964, he came to defendant's home where she tried to sell him some pants at $1.00 a pair. He said he would try to sell them (A. 11). She wanted $200 for the pants. He sold the pants to a tavern owner for $175, and then took $25 out of his own pocket and gave her $200 (A. 12). The pants were the product of a burglary that had occurred previously.

After Freberg was arrested he took the pants back from the tavern owner and was going to return them to the sheriff's office (A. 13). On July 28, 1964, he took the pants out of his car and put them in an old paneled truck parked outside of a garage where he was employed (A. 13). A deputy sheriff recovered the pants, although Freberg did not tell anybody where they were (A. 13).

A few days before the start of petitioner's trial in February, 1965, Freberg telephoned Alex Rafferty III, the defense attorney at Rafferty's home. He told Mr. Rafferty he was worried and wanted some advice; but the attorney told him he could not tell the witness how to testify. The witness testified he did not remember whether he told Mr. Rafferty that he did not want to testify against the petitioner because, "I didn't really get the trousers from Mrs. Dell." (A. 14).

There was considerable question about the value of the trousers. The owner of the trousers testified that they had been marked down because of a water-logged fire sale. The pants in court were dirty and wrinkled, and there were either 125 or 129 pairs of pants introduced into evidence (A. 10). When asked to give his opinion, the owner said that the value of 129 trousers were exactly the same as that of 125 trousers, which was $250, "give or take pennies." (A. 10).

An Illinois statute[2] in existence at the time of the trial made theft of merchandise of a value of over $150 a felony punishable by imprisonment from one to ten years in a penitentiary. If the value were less than $150, the crime was a misdemeanor and the punishment could not exceed one year in a county jail, a fine, or both.

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[2] Chap. 38, Sec. 16-1, Ill. Rev. Stat., 1963.

In submitting forms of verdict to the jury, the court instructed the jury as follows:

> "As to the form of your verdict:
>
> "If you find the defendant, Ruth Dell, guilty of theft, in manner and form as charged in the Indictment, in your verdict you will say:
>
> 'We, the jury, find the defendant Ruth Dell guilty of Theft in manner and form as charged in the Indictment.
>
> 'And we further find from the evidence the value of the property so stolen to be $250.00.
>
> 'And we further find from the evidence that the said defendant is now about the age of 38[3] years.'
>
> OR
>
> "If you find the defendant, Ruth Dell, not guilty, in your verdict you will say:
>
> 'We, the jury, find the defendant, Ruth Dell, not guilty.'
>
> "And all the jurors will sign the verdict agreed upon and returned by them." (A. 6).

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[3] The figure "38" was also on the form of verdict sent to the jury. There was not a word of testimony in the entire record touching upon petitioner's age.

REASONS FOR GRANTING THE WRIT

The petitioner was denied her constitutional right to trial by jury on factual issues.

The trial judge impermissibly directed the jury to find the amount of value by having inserted the amount "$250" in the form of verdict submitted to the jury. The Appellate Court stated, "There is a sharp disagreement between the parties as to the completion of the verdict form as to value." The State may disagree as to what happened, but *record* is crystal clear. Page 93 of the original certified transcript of record carries the exact language used by the court in addressing the jury. It is as follows:

> "As to the form of your verdict:
>
> "If you find the defendant, Ruth Dell, guilty of theft, in manner and form as charged in the Indictment, in your verdict you will say:
>
> 'We, the jury, find the defendant Ruth Dell guilty of Theft in manner and form as charged in the Indictment.
>
> 'And we further find from the evidence the value of the property so stolen to be $250.00.
>
> 'And we further find from the evidence that the said defendant is now about the age of 38 years.'
>
> OR
>
> "If you find the defendant, Ruth Dell, not guilty, in your verdict you will say:
>
> 'We, the jury, find the defendant, Ruth Dell, not guilty.'
>
> "And all the jurors will sign the verdict agreed upon and returned by them."

The numerals "$250.00" were inserted on the form of the verdict before it went to the jury room. Otherwise, how could the judge have read the figures to the jury?

In addition, although there was not a word of evidence in the record as bearing on defendant's age, she was found by the jury to be "38 years"—because the judge included the age in the form of the verdict submitted to the jury.

The Appellate Court hedged; it made no finding about what the judge did or did not do. It avoided the constitutional issue by stating that the point was not raised in petitioner's post-trial motions and, "Accordingly, we will not consider it for the first time on review."

The Appellate Court has ignored that the claimed error went to the heart of the case—the invasion by the trial judge of the jury's fact-finding function. We cannot imagine an error more affecting substantial rights of a defendant. And especially where the degree of offense determined incarceration in a penitentiary (5 to 10 years in the Women's Reformatory) or a fine or imprisonment for not more than one year. (Ch. 38, Sec. 16-1, Ill. Rev. Stat., 1963). The Illinois courts in this respect are in conflict with federal holdings on the identical issue. See *United States* v. *Kramer,* 2 Cir., 289 F.2d 909 at 921 where the court held that the Sixth Amendment entitled a defendant to have the value of stolen property determined by jury rather than by judge, where value affected punishment.

A series of recent cases are authority for the proposition that errors affecting substantial rights may be noticed on appeal even though not brought to the attention of the trial court. *People* v. *Bradley,* 30 Ill.2d 597, 601, 198 N.E.2d 809; *People* v. *Fleming,* 54 Ill.App.2d 457, 203 N.E.

2d 716; *People* v. *DeStefano*, 64 Ill.App.2d 389, 212 N.E.2d 357; *United States* v. *Gougis, Jr.*, 7 Cir., 374 F.2d 758, 762.

We cannot imagine a more serious error affecting vital, substantial and constitutional rights of a defendant than the claimed error here.

CONCLUSION

We respectfully submit petitioner's constitutional right to have all disputed issues decided by a jury, and not by a judge, was violated. We pray this court will grant its Writ of Certiorari.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

APPENDIX "A"

No. 65-135

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
(Decided December 20, 1966)

PEOPLE OF THE STATE OF ILLINOIS	)	
Appellee,	)	Appeal from Circuit
v.	)	Court Lake County
RUTH DELL,	)	
Appellant.	)	

MR. JUSTICE ABRAHAMSON delivered the Opinion of the Court:

The defendant was convicted of theft after a jury trial in the Circuit Court of the Nineteenth Judicial Circuit, Lake County, and sentenced to a term of five to ten years in the Illinois State Reformatory for Women.

The indictment, filed December 7, 1964, charged that the defendant "committed the offense of theft, in that she knowingly obtained control over 129 pairs of trousers, having a value exceeding One Hundred Fifty Dollars ($150), the property of Myron Steinberg, knowing that said trousers had previously been stolen from Myron Steinberg by another and Ruth Dell thereafter knowingly abandoned such trousers in such manner as to deprive Myron Steinberg permanently of the use and benefit of said trousers, in violation of Section 16-1 (d), Chapter 38, Illinois Revised Statutes 1963 . . . . "

This appeal is brought on defendant's contentions that there was a fatal variance between the proof of ownership of the pants and the ownership alleged in the indictment; that there was no proof that the pants introduced into evidence were ever possessed by the defendant; that there was no proof that the defendant knew that the pants allegedly in her possession were stolen; that there was no proof as to the value of the pants; that the defendant was denied her right to trial by jury in that the court directed the jury to evaluate the pants at $250; that the defendant was denied a fair trial because the State attempted to introduce evidence of other, unrelated crimes; and, finally, that the conviction cannot be sustained as it is based on the uncorroborated and improbable testimony of an accomplice to the alleged crime. We will deal with each of these contentions in the order we have indicated.

As we have seen, the indictment stated that the trousers were "the property of Myron Steinberg". At the trial, Steinberg testified that he was a partner in a business known as the Illinois Railroad Salvage Store. Upon his arrival at the store on the morning of July 21, 1964, Steinberg noticed that it was in disarray and that an entrance had been accomplished by the removal of five or six cement blocks from the south wall. On cross examination, he stated that his partner was Norman Cutler.

Cutler testified that he was a partner of the Salvage Store and that on July 21 he noticed, in addition to the facts related by Steinberg, that the entire stock of men's work pants was missing. When asked if he recognized People's Exhibit No. 1 for identification, consisting of 129 pairs of pants, Cutler replied "Those are my pants".

Later, Cutler was asked who owned People's Exhibit No. 1 on July 20, 1964 and the following colloquy resulted:

"A. I did.
"Q. In addition who else owned it?
"A. I have a partner.
"Q. What is his name?
"A. Myron Steinberg."

The defendant cites several cases to the point that the specific ownership of stolen property is an essential allegation in an indictment and, as such, must be proven, as laid in the indictment, at the subsequent trial. *The People* v. *Cohen,* 352 Ill. 380, 382 (1933); *The People* v. *Krittenbrink,* 269 Ill. 244, 245 (1915). The reason for the rule was to permit the defendant to plead either a prior acquittaltal or conviction in the event of a later prosecution for the same offense. *The People* v. *Smith,* 341 Ill. 649, 651 (1930).

However, under the Criminal Code of 1961, the owner of property as used in the section entitled *"Part C. Offenses Directed Against Property"* is defined as follows:

> " . . . . . 'owner' means a person, other than the offender, who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property." (Illinois Revised Statutes, 1963, Chap. 38, Sec. 15-2).

Subsequent cases have held that this Section provides that specific ownership of the stolen property in the person named in the indictment is not necessary if it is shown that he has some possessory interest in the property at the time of the offense, such as an agent of the owner or bailee. *The People* v. *Hansen,* 28 Ill.2d 322, 338, 339 (1963); *People* v. *Tomaszek,* 54 Ill. App. 2d 254, 261, 262 (1964).

Here, Cutler indicated that the trousers were owned by his partner and himself, that is, that they were partnership property. It is true that the indictment does not aver that the trousers were owned by the partnership but Steinberg, as a partner, clearly had a right of possession "or other interest" in the property as required by Section 15-2. We, therefore, feel that the ownership of the trousers was adequately established at the trial as alleged in the indictment.

Charles Freberg, the key witness for the State, a twenty-one year old service station attendant, testified that he received a telephone call from the defendant at approximately 2:00 P.M. on July 21, 1964, and that she informed him that "she had some pants for me, if I wanted to come up to the house and pick them up in the evening." Accordingly, Freberg visited the defendant's house at about 6:30 P.M. that evening and went to her bedroom with the defendant, her son, Jeffery, one Rodney Gummow; and another woman named "Pat". Freberg stated that the pants that comprised People's Exhibit No. 1 were stacked on the bed and that the defendant "told me that she wanted me to sell the pants for her; that she wanted a dollar a pair for her and anything that I could get over that I could have". Freberg and the others then carried the pants to the trunk of his car and he subsequently sold them for $175. Freberg's version of what took place at the defendant's home is sharply controverted by the testimony of Rodney Gummow. Nevertheless, Freberg's testimony was competent evidence, to be weighed and evaluated by the jury, that the pants were in the possession of the defendant. While no direct proof was introduced to show that the defendant knew at that time that the pants were stolen, such knowledge can be established by indirect or circumstantial evidence. *The People* v. *Stewart*, 20 Ill. 2d 387,

392 (1960); *The People* v. *Grodkiewicz*, 16 Ill. 2d 192, 197 (1959). Indeed, although guilty knowledge is an essential element of the crime, direct evidence of that knowledge is seldom available. It is sufficient if the circumstances that surround the possession of the property are such to induce a belief in a reasonable mind that the possessor had knowledge that the property was stolen. *The People* v. *Lindstrom*, 9 Ill. 2d 616, 618 (1956). The defendant's unexplained possession of 129 pairs of men's wash pants within a short time after their disappearance; their location in the bedroom of her home; and her request of Freberg, a service station attendant, to sell them for $1.00 per pair; are all circumstances that could reasonably induce a belief that she was aware that they were stolen. We are of the opinion that the conclusion of the jury that the guilty knowledge of the defendant in this respect was proven beyond a reasonable doubt is supported by the evidence.

The defendant next urges that since there was no evidence of the fair cash market value of the trousers at the time and place of the theft, the conviction must be reversed. She points out that in a prosecution for theft that the value of the property determines the seriousness of the offense and, hence, the punishment and that, therefore, the market value of the pants was of great importance in her case and should not have been left to vague, indefinite and uncertain proof. The only evidence introduced as to the value of the pants was the testimony of Norman Cutler. He stated that he had purchased trousers for his business for a period of seven years and that during that time he had purchased some 7,000 pairs of trousers. Cutler was then asked as to his opinion as to the "value" of the trousers in People's Exhibit No. 1. He replied "$250". No evidence was offered by the defense to rebut that evaluation.

It has been held that testimony in regard to the value of stolen property may be received in response to a question as to its "value" or "worth" and be sufficient proof, by itself, of the market value at the time of the alleged crime in the absence of any objection. *The People* v. *Officer,* 10 Ill. 2d 203, 206 (1957); *The People* v. *Mowry,* 6 Ill. 2d 132, 140 (1955).

In view of his past experience in the business, Cutler was qualified to give his opinion as to the value of the trousers before the court, and, since no evidence to the contrary was offered, that opinion, as expressed, was adequate evidence of the market value of the property.

The defendant also raises the point that the trial court directed the jury to find that the value of the trousers was $250 and that she was consequently denied her right to trial by jury. There is a sharp disagreement between the parties as to the completion of the verdict form as to value. The defendant claims that the trial judge had written in the figures "$250" as the value of the property before the verdict form was submitted to the jury. The State insists that the value was added by the jury. We note, however, that this point was not raised by the defense in its post trial motions for judgment notwithstanding the verdict, in arrest of judgment, or for a new trial. Accordingly, we will not consider it for the first time on review. *The People* v. *Irwin,* 32 Ill. 2d 441, 443 (1965); *People* v. *Bridges,* 67 Ill. App.2d 236, 239 (1966).

Freberg was asked, on direct examination, whether he had ever been requested by the defendant in the past to sell anything for her. Over objection, he stated that on five or six prior occasions, she requested him to sell "rings and watches." At this point, the court sustained the objection of the defense and advised the jury to disregard

his testimony in that respect. The defendant contends that the court should have granted the motion for a mistrial. The question and answer were clearly improper. However, the trial court effectively cured the error by its prompt admonition to the jury to disregard the exchange.

Lastly, it is argued that the conviction is based solely on the uncorroborated testimony of Charles Freberg, an admitted accomplice, and that the testimony itself is so burdened with contradictions and improbabilities as to be wholly lacking in credibility.

The uncorroborated testimony of an accomplice is always scrutinized carefully due to its inherent weaknesses. *The People* v. *Hermens,* 5 Ill. 2d 277, 285 (1955); *People* v. *Zaeske,* 65 Ill. App. 2d 495 (1965). Under the law in Illinois, however, it can be sufficient by itself to sustain a conviction if it establishes the guilt of the accused beyond a reasonable doubt. *The People* v. *Hansen, supra,* p. 332; *The People* v. *Bugg,* 345 Ill. 210, 216 (1931).

An affidavit signed by Freberg in January of 1965 appears in the record. In that affidavit, Freberg states that Ruth Dell had no connection with the robbery of the Railroad Salvage Store in July of 1964. Freberg further admits telling an attorney in August of 1964 that he had only implicated the defendant in the crime because of threatened prosecution. He also admitted a telephone call to the defense counsel shortly before the trial for advice as to his testimony. During the trial, Freberg testified that although he had sold trousers for only $175, he paid the defendant $200 "just to be over with it." The defendant maintains that these self-contradictions and improbable sequence of events as related by Freberg render his testimony insufficient upon which to predicate the conviction.

A close reading of Freberg's testimony reveals, however, a clear thread of consistency, and that consistency is based on his persistent, deep fear of the defendant. He testified that after receiving an offer of $175 for the pants that Ruth Dell told him she would take no less than $200. Therefore, on July 22, 1964, he paid her the $200 and told her he "didn't want to have any more" and that he gave her $25 of his own money "just to be over with it." After he was apprehended by the police, he received a phone call from the defendant on July 28 in which she told him that "she found out I squealed on her, and she was going to send a couple of boys down to pick me up and bring me to her house." Later that evening, Gummow and Jeffery Dell did drive to the service station where Freberg was employed to find him but were diverted by his employer. On another occasion, shortly thereafter, Freberg while in his car, was followed by the defendant and three men until he succeeded in evading them. He described the defendant's home as set back 600 to 700 feet from the road on a tract of 3 or 4 acres of land, entirely surrounded by a large cyclone fence, and that to gain entrance it was necessary to identify one's self over a loud speaker before the gates would open mechanically. He explained that his statements to the lawyers and his affidavit were as a result of "fear" and "worry" of reprisals from the defendant.

It is commonplace to recite that the credibility of the witness and the weight of the evidence are matters within the province of the jury and the trial court. If they are convinced that the accused is guilty beyond a reasonable doubt, even on the uncorroborated testimony of an accomplice, we will not substitute our judgment for theirs unless it plainly appears that such a degree of proof is lacking. *The People* v. *Hansen, supra,* p. 332; *The People* v. *Rudnicki,* 394 Ill. 351, 357 (1946).

From the record before us, it does not appear that the court or jury abused their function in this instance. The judgment and conviction of the trial court will be affirmed for the reasons enumerated.

JUDGMENT AFFIRMED.

MORAN, P. J. and SEIDENFELD, J. CONCUR.